

1 something in my previous experience where I formed an
2 opinion or I did some study."

3 But in this case, if you'll look at page
4 29 of Exhibit 61, "Departures from the FCC formula.
5 The model agreement attached rate calculator departs
6 from the FCC formula in four respects."

7 The next paragraph goes on and says the
8 cable television rate -- I'm reading the second
9 sentence of the second paragraph -- is a holdover from
10 a desire in the late 1970s to assist the then nascent
11 cable television industry by establishing a low rate.

12 This is part of an ongoing challenge that
13 the utility industry has had to FCC rate which Your
14 Honor may or may not be familiar with, but for decades
15 since the 1987 Pole Attachment Act. You may know that
16 in 1987, they went to the United States Supreme Court
17 in Florida Power v. FCC, and that the Supreme Court
18 upheld the Constitutionality of the FCC rate
19 regulation saying that there's no mandatory access.

20 Now we've had Section 224 passed in 1996.
21 They brought a series of challenges known as Gulf
22 Power I, Gulf Power II, Southern Company I, Southern

1 Company II, and Alabama Power. There are five federal
2 court of appeals decisions that pertain to the ongoing
3 decades long utility industry challenge.

4 How does this relate to our challenge
5 here? This is essentially taking the legal brief or
6 a position paper, if you will, almost a lobbying piece
7 that is consistent with all of their challenges over
8 the years and saying, "You know, our experts relied on
9 things that our industry has written to form his
10 opinion, and we would like it offered in evidence."

11 I submit to you that unlike other
12 experience based things that experts have done in the
13 past or general treatises that are acknowledged and
14 accepted as impartial, this position paper for the
15 utility industry is not an appropriate exhibit in
16 evidence.

17 It may be that it can be consulted and
18 referenced, but it should not be admitted in evidence.
19 It's essentially an extra legal brief.

20 JUDGE SIPPEL: But it sounds to me -- I'm
21 hearing different things in your argument, but one
22 thing that strikes me is it seems to me that you're

1 saying that, in effect, this is a weak piece for
2 supporting an expert's opinion. This is kind of --

3 MR. COOK: No, my focus is that --

4 JUDGE SIPPEL: -- prattle that can get in
5 a trade association.

6 MR. COOK: This should not be admitted as
7 a matter of bias because this is essentially like
8 taking the trial brief that you will get from Gulf
9 Power in a day or so and stamping it as documentary
10 exhibit and giving it to you again. It amounts to an
11 extra legal brief which goes to the ultimate issue,
12 which as a matter of deciding what's relevant and
13 what's not, materials that are written that are
14 essentially advocacy pieces that go to the ultimate
15 issue should not be accepted in evidence for the trier
16 of the fact.

17 MR. CAMPBELL: I'd like to respond to the
18 bias issue. First off, bias is an issue of weight.
19 It's not an issue of admissibility. He can explore
20 that on cross examination, but the bias issue I don't
21 even understand because the APPA is not a party to
22 this proceeding, nor is the APPA party to any of the

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1 proceedings that he listed in his long lineage of the
2 history of the fights.

3 So I don't understand the bias argument.
4 It doesn't make any sense.

5 But secondly, to all this a piece of
6 advocacy is really a mischaracterization. if you flip
7 back, just as an example, to the back of this document
8 at page 121 of Tab 61, you can see some of the things
9 that we're talking about in this proceeding: the
10 construction specifications. This is not advocacy.
11 This is what another industry participant does, and
12 this is their handbook, their manual, their guidebook,
13 on how they deal with the joint use relationships.

14 Our expert took a look at this manual and
15 said, "You know what? I'm being asked to opine on
16 Gulf Power's techniques, on Gulf Power's valuation, on
17 Gulf Power's replacement cost methodology, and I find
18 it highly relevant that another industry player out
19 there that is not constrained by the federal
20 regulation -- how do they do it? How do they
21 calculate pole attachment rates and methodologies?
22 And I'm going to rely on that as an expert to opine in

1 this case."

2 Immanently reasonable, highly relevant,
3 and certainly admissible.

4 JUDGE SIPPEL: Well, Mr. Seiver.

5 MR. SEIVER: The last thing is that that
6 means Mr. Spain's summary and the deposition was
7 somewhat wasted, and I thought the summaries were
8 supposed to be tied into the actual testimony and that
9 there was not supposed to be additional materials
10 consulted or identified or produced after, and I just
11 don't understand the summaries were, I guess, almost
12 a waste.

13 JUDGE SIPPEL: Well, yeah. Does this
14 change the summary? I mean what --

15 MR. CAMPBELL: It doesn't change anything,
16 Your Honor. All it says is: do you know what? My
17 testimony that I gave in my summary in my deposition
18 is accurate because it's just like what other people
19 are doing out there.

20 What Mr. Spain did when he left his
21 deposition for purposes of writing his prefiled
22 direct, just like their expert, continued to do his

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1 work, and in doing his work, he stumbled across this
2 document, and he says, "Guess what. This is exactly
3 what I'm saying. These people are doing it, if not
4 identical, very similar to what Gulf Power is doing,
5 and that buttresses my opinion that what they're doing
6 is reasonable."

7 JUDGE SIPPEL: Well, I'm going to sustain
8 the objection for any number of reasons, but -- well,
9 I'm not going to go into detail on it. I think the
10 points that were raised by Mr. Cook and Mr. Seiver are
11 very valid, that it is an advocacy piece put together
12 by a trade association that was picked up by your
13 expert after the fact. There has been no reasonable
14 notice to the other side, and the document is just
15 loaded with information and material that it would put
16 the Complainants at a disadvantage with an expert
17 witness, which to me that's significant.

18 MR. CAMPBELL: I understand your ruling,
19 Your Honor. We would be permitted to cross examine
20 their industry experts concerning this same document.

21 JUDGE SIPPEL: Well, the document will
22 stay in. It's marked for identification. It's

1 rejected, and it will be in the record, and you know,
2 if you feel that you have a valid use for some parts
3 of it in some other context, you can offer it.

4 MR. CAMPBELL: Thank you, Your Honor.

5 JUDGE SIPPEL: Mr. Seiver.

6 MR. SEIVER: Thank you.

7 JUDGE SIPPEL: All right. Let me make my
8 ruling -- go ahead. I'm sorry. Finish your
9 statement. Are you finished? What about 62?

10 MR. SEIVER: That's exactly what I was --
11 I was ready to do 62, Your Honor.

12 JUDGE SIPPEL: All right. Let's do 62.

13 MR. SEIVER: Would you like me to do that?

14 JUDGE SIPPEL: Let's do 62.

15 MR. SEIVER: Sixty-two, again, is an
16 agreement that is -- and we'll repeat this when we get
17 to the next volume -- whether or not there's an
18 agreement that Gulf Power has with someone other than
19 the Complainants we thought was not relevant. I mean,
20 we obviously have talked to them about it and gone
21 through it and gone through the joint use agreements,
22 but our objection is that this, again, is similar. It

1 does not show that, in fact, KMC Telecom is willing to
2 pay a rate or enter into an agreement. It has nothing
3 to do with the loss or the full capacity.

4 But that's a variation on the objections
5 we have made before.

6 JUDGE SIPPEL: Mr. Campbell?

7 MR. CAMPBELL: I think the objections have
8 already been dealt with. These are more of these
9 other attachments like ILEC attachments.

10 JUDGE SIPPEL: This is nonregulated?

11 MR. CAMPBELL: Correct, and these were
12 also referred to in the testimony of Mr. Dunn,
13 referred to in the testimony of Mr. Bowen, referred to
14 in the affidavits of Mr. Dunn that have been admitted
15 as Exhibits 1 through 3, and so this is nothing that's
16 new to the Complainants in this proceeding. These
17 agreements have been talked about. They've been
18 bantered around in depositions, and so these should be
19 admitted.

20 MR. SEIVER: Your Honor, if I could
21 respond to Mr. Campbell just briefly.

22 JUDGE SIPPEL: I was just going to ask him

1 if he would -- are these distinguished at all from the
2 CHELCO agreements? I mean, they are different
3 entities, of course, but --

4 MR. CAMPBELL: Yes, the CHELCO agreements
5 were agreements between the Complainants and an
6 unregulated municipal cooperative.

7 JUDGE SIPPEL: Yes.

8 MR. CAMPBELL: These are agreements
9 between Gulf Power and other people attaching to Gulf
10 Power's poles and what they pay, what the terms and
11 conditions are.

12 JUDGE SIPPEL: Are they regulated?

13 MR. CAMPBELL: Unregulated.

14 JUDGE SIPPEL: They're unregulated.

15 MR. CAMPBELL: Yes, sir. These are just
16 like the ILEC attachments. These are people that are
17 on our poles, and so when we're talking about our pole
18 space, we're talking about opportunities that are out
19 there. This would go in that bucket.

20 MR. SEIVER: Well, Your Honor, I think we
21 have to correct -- I don't think Mr. Campbell meant
22 what he said. Telecommunications carriers, such as

1 KMC and the other entities, Hyperion, are subject to
2 224 and their rates with an investor owned utility are
3 subject to regulation. The fact that these entities
4 elected not to pay the formula, the FCC formula and
5 pay some other rate is an issue we did explore at
6 deposition because we thought that there was to
7 getting to market a fewer number of poles, you know,
8 whatever the leverage was between them, which is why
9 these people who had available to them the complaint
10 process of this Commission under 224 to say, "No, I
11 don't need to pay \$38 a pole or \$40 a pole or whatever
12 it might be."

13 They are regulated. They chose for
14 whatever reason, which we think is not relevant to
15 whether or not there's a loss or whether or not there
16 is a full pole, to pay Gulf Power something other than
17 the regulated rate, and so if this is a regulated
18 market, and I think those unique circumstances do
19 point up something that we would bring out on cross
20 examination, would have nothing to do with the proof
21 that would satisfy the APCo standard for Gulf Power.

22 MR. CAMPBELL: Mr. Seiver is correct. As

1 I look back at the exhibit list, I was thinking of
2 other agreements that we have out there. These are
3 regulated entities and they are offered for the
4 purpose of showing that even people who are subject to
5 the protection of the act are willing to pay different
6 rates, higher rates to attach to these facilities.
7 The existence of that market, the market where willing
8 buyers and willing sellers will go out and pay a rate
9 that is multiple times higher than the regulated rate
10 is something that is at issue in this proceeding, has
11 been at issue in this proceeding. There has been
12 affidavit testimony about it. There will be testimony
13 by the witnesses on the stand.

14 And if Mr. Seiver has a point of departure
15 from that, something that is a unique circumstance,
16 that is an issue of weight. It is not an issue of
17 admissibility. He can cross examine the witness and
18 say, "Isn't it true that this person could avail
19 themselves of the act and they voluntarily decided to
20 pay a higher rate?"

21 And he can explore the reason why he
22 thinks that exists, but this is another example of the

1 type of attachers that are on our pole, how our pole
2 space is being used, finite pole space, who the bucket
3 of attachers are out there that are available for this
4 unique space, and what they're willing to pay.

5 JUDGE SIPPEL: Is this attacher or these
6 attachers, are they cable companies?

7 MR. CAMPBELL: Telecommunications
8 companies.

9 JUDGE SIPPEL: Telecommunications
10 companies. Okay. And I'm interested in really how
11 you phrased this. You're saying that for some reason
12 or another they desire to pay a premium over and above
13 the regulated rate in order to have the privilege of
14 hanging on Gulf Power's poles?

15 MR. CAMPBELL: I would say that they
16 accurately represent the value of the space, and they
17 realize that, and this all happened during the
18 pendency of the early fights during all of this, and
19 so it is just an example of that. It is a more
20 accurate representation of what opportunities are out
21 there for us.

22 These are transactions you can look at and

1 say, "This guy is willing to pay 18. This guy is
2 willing to pay 21. This guy is" -- and those numbers
3 I'm just pulling out of the air, but you look at that
4 and you say I've got to consider that in this universe
5 of evidence that I'm going to consider to determine
6 whether Gulf Power is entitled to something above
7 marginal cost.

8 I might also add that these particular
9 contracts, this type of contract was identified in our
10 description of evidence that we talked about that we
11 would bring in this proceeding as being relevant to
12 all of this, and so that needs to be considered as
13 well.

14 And, again, the issues that Mr. Seiver
15 raises are issues that go to weight. They do not go
16 to the admissibility of the document.

17 JUDGE SIPPEL: Well, I don't want to sound
18 too much like an economist here, but that sort of
19 strikes me as being in the area of market power, isn't
20 it? I mean people don't usually pay more than what
21 they have to pay.

22 MR. CAMPBELL: If they believe that the

1 rate that is regulated in the subject of the federal
2 state, is subject to attack and is vulnerable, they
3 might.

4 JUDGE SIPPEL: Well, I'm open to the
5 question. I'm not saying it's -- I'm not making a
6 determination on it, but it's interesting.

7 Mr. Seiver.

8 MR. SEIVER: One last point. The --

9 JUDGE SIPPEL: How does it hurt you?

10 MR. SEIVER: Pardon me? The telecom rate
11 was an issue in the APCo case as well. In fact I
12 recall it being an argument when Mr. Campbell made
13 the exact point to the court that at a minimum there
14 is a taking between the cable rate and the telecom
15 rate which the court addressed in APCo and rejected as
16 not being a taking because it's a different formula.

17 JUDGE SIPPEL: Right.

18 MR. SEIVER: Now we have evidence of
19 people that were paying even more than what the
20 telecom rate would be, and I have exhibits, as he well
21 knows that dispute that there was any thought of
22 someone saying, "You know what? You're right. Your

1 costs are more. So we should pay it. It's a value
2 judgment, and one of the letters that I will put in in
3 front of the witness if they are going to continue
4 with this shows that it was basically an extortion,
5 kind of take it or leave it.

6 If you want to get to market, agree with
7 us. Otherwise we're not doing it.

8 JUDGE SIPPEL: Well, I think there's
9 enough said on that one. I am not even sure if I'm
10 hearing an objection from Mr. Seiver, but certainly to
11 his commentary, we'll receive that into evidence. Are
12 there several other documents like that so that we can
13 do this as a --

14 MR. LANGLEY: Sixty-two, 63 and 64 are of
15 the same ilk.

16 JUDGE SIPPEL: Well, then I'll extend the
17 list then to 64, and let me go back and see where I
18 left off. I am starting with Exhibit 60; is that
19 right, Tab 60?

20 MR. SEIVER: Yes, Your Honor, that was the
21 summary.

22 JUDGE SIPPEL: Fifty-nine is where I left

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1 off.

2 MR. SEIVER: Oh, no, no, no. You ruled on
3 61.

4 JUDGE SIPPEL: No, wait a minute. I
5 haven't ruled on it.

6 MR. SEIVER: Oh, I'm sorry.

7 JUDGE SIPPEL: I did give you a ruling,
8 yes.

9 MR. SEIVER: Oh, I'm sorry. I'm sorry,
10 Your Honor. I didn't mean to -- you're right.

11 JUDGE SIPPEL: That's in Column B. I
12 mean, my Column A rulings which have to do with
13 receiving them starts with 60.

14 MR. SEIVER: That's correct.

15 JUDGE SIPPEL: All right. I want to from
16 60 to 64 on this then, and my ruling is with
17 everything with the exception of 61. Okay? And that
18 is the documents that have been tabbed by Gulf Power
19 as Documents 60 through 64 are now identified, deemed
20 to be marked identified for evidence as Gulf Power
21 Exhibits Nos. 60 through 64, and with the exception of
22 Exhibit 61, which is marked for identification and is

1 rejected as an exhibit, Exhibits 62 -- I'm sorry --
2 the documents marked for identification as Gulf Power
3 60 through 64, with the exception of 61, are received
4 in evidence as Gulf Power exhibits.

5 So 61 is out as an exhibit, but it remains
6 in the record as a marked exhibit, and it's subject to
7 the various rulings that were made with respect to the
8 further use of that document.

9 (Whereupon, the documents
10 referred to were marked as Gulf
11 Power Exhibit Nos. 60 and 62
12 through 64 were marked for
13 identification and received in
14 evidence. Gulf Power's Exhibit
15 No. 61 was marked for
16 identification and rejected from
17 evidence.)

18 JUDGE SIPPEL: All right. That gets us
19 then out of Notebook 4 of 5 and brings us to Notebook
20 5 of 5.

21 MR. LANGLEY: Your Honor, the only
22 remaining exhibit is a compilation of documents marked

1 as Exhibit 65. These are all documents that
2 previously have been identified pursuant to a
3 discovery request from Complainants as evidence of our
4 evidence of the unregulated market, which there's been
5 great discussion here this morning.

6 We would move to admit these documents
7 which are marked Exhibits 65, Tab 65, in Volume 5 of
8 5 into evidence.

9 JUDGE SIPPEL: Okay. Mr. Seiver, any
10 problems with this?

11 MR. SEIVER: Sixty-five we believe is more
12 of the same of 62, 63, and 64. So our objects on
13 those three exhibits and the commentary may apply to
14 65.

15 JUDGE SIPPEL: All right. I'll take that
16 as an objection. I'm going to overrule the objection
17 and, based on the proffer of Mr. Langley, the tabbed
18 document is an extensive document, but it's tabbed
19 under Tab 65 in Notebook 5 of 5, is marked for
20 identification and is received in evidence in its
21 totality as Gulf Power Exhibit 65. And that's the end
22 of -- yes, sir, Mr. Cook.

1 MR. COOK: If I can make just a
2 clarification for the record. I'm not sure Mr. Seiver
3 got a chance to mention this, but one of the principle
4 objections, again, would be relevance to all of 65 as
5 well as 62 through 64 because, as Your Honor noted,
6 these are what other people pay, some regulated, some
7 unregulated, but again, have nothing to do with
8 capacity of Gulf's poles containing Complainants's
9 attachments or any lost cause by Complainants.

10 JUDGE SIPPEL: I will make note of that
11 and I do. I follow the reasoning of that in terms of
12 relevance, but obviously it's a subject that the
13 Alabama Court dealt with. I don't see where its
14 receipt into evidence could prejudice the
15 Complainants' case.

16 On the other hand, of course, it's in the
17 broad context of relevance, and I think, again, I
18 conclude that it is a subject that certainly the
19 Commission would want to see addressed if it's going
20 to come up to them.

21 So I'm going to overrule the objection and
22 receive it into evidence as a matter of discretion as

1 Exhibit 65, and that's the end of Volume 5, Notebook
2 5.

3 (Whereupon, the document referred
4 to was marked as Gulf Power
5 Exhibit No. 65 for identification
6 and was received in evidence.)

7 JUDGE SIPPEL: Where else do we stand now
8 with respect to your evidence, your documentary
9 evidence?

10 MR. CAMPBELL: The only issue that needs
11 to be raised, and I understand we're only dealing with
12 the documentary evidence here today, not the
13 testimonial evidence, but we have deposition
14 designations that have been made, and within some of
15 the deposition designations there are exhibits that
16 have been referred to.

17 We separately listed those on our final
18 exhibit list, and I don't know how the Court or the
19 Complainants want to deal with that issue. Most of
20 them are items that are their documents. So I'm not
21 sure there would be any objection, but I do think in
22 the interest of completeness, that issue should be

1 discussed as a housekeeping item.

2 MR. SEIVER: Your Honor, we have no
3 problems. The exhibits that are listed, they do it by
4 witness. After that, and I do think we're probably
5 going to talk about witnesses today at some point, but
6 we have no problem because some of them are
7 duplicative of those Gulf Power spec plates. You'll
8 see, Your Honor, in the Exhibit A to the 50 pole
9 identification, I think, comes in at least twice. The
10 Cox Construction specification is more photographs and
11 pole information. We really have no objection to any
12 of that at all.

13 MR. CAMPBELL: Subject to that I'll make
14 a suggestion that we move into evidence all of the
15 exhibits that are referred to in Gulf Power's
16 deposition designations, and when we go back and do
17 our homework, to list the page numbers that exist in
18 all of the exhibits that we've admitted into evidence,
19 we will specifically identify those documents for the
20 court reporter as well.

21 JUDGE SIPPEL: Exactly. Now, I concur
22 with that, and I appreciate the spirit in which this

1 is being done.

2 I have on the list that my legal tech
3 prepared for me -- these are marked as A through L; is
4 that correct?

5 MR. CAMPBELL: No, portions of A through
6 L. A through L captured all of the testimonial
7 evidence that we're going to submit. Where this comes
8 up is starting with Gulf Power G through L, and those
9 are testimony by way of deposition destinations.

10 JUDGE SIPPEL: I see.

11 MR. CAMPBELL: And within that there are
12 exhibits that are referred to. That's what we're
13 dealing with here, and so we will move those into
14 evidence. We will specifically identify them. I
15 don't understand there to be an objection, and so I
16 think that issue is dealt with nicely.

17 MR. SEIVER: I do have a question though.
18 I'm sorry, Mr. Campbell. I didn't mean to interrupt
19 you. The deposition excerpts of Mr. Tessieri, those
20 are remaining? I mean, that's Exhibit L, and you did
21 not have any other exhibits referred to in the
22 identification. So there are no exhibits for Mr.

1 Tessieri that you wanted to put in?

2 MR. CAMPBELL: Well, that was an issue
3 that I understood we were going to discuss with
4 respect to Mr. Tessieri, but I don't believe there
5 were any exhibits that were contained in the
6 designations that were made. If there are, I have
7 omitted to put them on our exhibit list. But we can
8 deal with that separately.

9 JUDGE SIPPEL: Well, what will your timing
10 be? What would you like your timing to be on this?
11 Do you want to handle this this afternoon or do you
12 want to --

13 MR. CAMPBELL: Given the trial brief
14 issue --

15 JUDGE SIPPEL: Yes, go ahead.

16 MR. CAMPBELL: Given the trial brief
17 issue, I would ask that we be allowed to make these
18 submissions at least the day following submission of
19 our trial brief. We really need to turn our attention
20 to the trial brief and finalizing that document, which
21 I understood to be due tomorrow. We have entered into
22 a stipulation, subject to the Court's approval, with

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1 the other side to have a one day extension.

2 We've also checked with Ms. Griffin here
3 to be sure that they had no objection to that, and we
4 would like to get the Court's approval for that.

5 MR. SEIVER: We're fine with them having
6 a day if we can have a day, and I'm assuming that you
7 would electronically serve us not tomorrow then, but
8 Wednesday; is that right?

9 MR. CAMPBELL: Wednesday afternoon
10 following the protocol we've established with all of
11 these documentary submissions.

12 MR. SEIVER: As long as we have it
13 electronic on Wednesday, then we only need the extra
14 day. I guess that would put us to the 18th.

15 MR. COOK: Right. Your Honor, for the
16 record, I believe that means that their trial brief
17 instead of coming to you tomorrow, the 11th, would
18 come Wednesday, the 12th. And then ours which is
19 currently scheduled to come to you a week from today,
20 Monday, the 17th, would come Tuesday, the 18th, if
21 Your Honor is agreeable to each side having one
22 additional day.

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1 MS. GRIFFIN: Your Honor, I'm fine with
2 that if I can have an extra day. So I'm sure we're on
3 the same comments.

4 JUDGE SIPPEL: Yeah, and yours is on the
5 comments. So you would do the 20th on the comments.
6 So that would bump you to the 21st.

7 MS. GRIFFIN: The 21st. That's still a
8 weekday, right?

9 MR. COOK: The 21st is a Friday.

10 MS. GRIFFIN: If that's agreeable with
11 you.

12 JUDGE SIPPEL: Well, they're not going to
13 object to that, I'm sure. That's fine. That's fine,
14 Ms. Griffin.

15 That's no problem. Well, let me tell you
16 what my situation is. I'm going to be on family
17 business. I'm going to be out of town from the 12th
18 through the 18th, and I want to see that trial brief.
19 Would you have any objection, is there anything in it
20 that's super secret? Could I have my paralegal
21 electronically transfer it to me?

22 MR. COOK: On the 18th?

1 JUDGE SIPPEL: Yes. I mean, I'd be
2 outside the agency. I can get a facility. I can have
3 a way of receiving it, but --

4 MR. SEIVER: I don't think that would be
5 a problem, Your Honor.

6 MR. COOK: Yeah. Actually both sides have
7 taken the precaution because of the confidentiality
8 order of marking many of these things confidential,
9 and that's something we'll have to --

10 JUDGE SIPPEL: Well, we're going to get to
11 that.

12 MR. COOK: -- deal with.

13 JUDGE SIPPEL: I don't want to raise that
14 might now, but my question is -- well, actually I'm
15 talking to the wrong side of the room here. This is
16 your trial brief. This is Gulf Power's trial brief.
17 Would you have any objection to that?

18 MR. CAMPBELL: We have no objection to
19 that.

20 MR. LANGLEY: None at all.

21 JUDGE SIPPEL: All right. Okay. Then if
22 that's -- you certainly can consider your time to be

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